

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
BellSouth Telecommunications, Inc.)	
)	
Request for Declaratory Ruling That)	WC Docket No. 03-251
State Commissions May Not Regulate)	
Broadband Internet Access Services by)	
Requiring BellSouth to Provide Wholesale)	
or Retail Broadband Services to)	
CLEC UNE Voice Customers)	

COMMENTS OF SBC COMMUNICATIONS, INC.

I. INTRODUCTION

SBC Communications, Inc. (SBC) submits the following comments in support of BellSouth's above-captioned petition for a declaratory ruling.¹ As BellSouth's petition demonstrates, the Commission's authority to regulate interstate communications is under siege by certain overzealous state commissions.² Under the guise of enabling competitive local exchange carriers (CLECs) to serve their voice customers using unbundled network elements (UNEs), these state commissions have unlawfully attempted to regulate the provision of retail digital subscriber line (DSL) Internet access service and/or wholesale DSL transport service by incumbent local exchange carriers (ILECs). In doing so, these state commissions have disregarded this Commission's exclusive and well-established jurisdiction over interstate communications.³

¹ Request for Declaratory Ruling That State Commissions May Not Regulate Broadband Internet Access Services by Requiring BellSouth to Provide Wholesale or Retail Broadband Services to CLEC UNE Voice Customers, WC Docket No. 03-251 (Dec. 9, 2003) (BellSouth Petition).

² BellSouth Petition at 5-10.

³ See 47 U.S.C. §§ 151, 152.

The Commission should expeditiously grant the relief requested by BellSouth and preempt these unlawful state decisions, not only to preserve its jurisdiction under federal law, but also to ensure that the marketplace for broadband Internet access service develops under a uniform national policy framework rather than a thicket of conflicting and burdensome state regulations.

II. DISCUSSION

A. State Commissions May Not Usurp This Commission's Congressionally-Mandated Jurisdiction Over Interstate Communications Services.

It is black letter law that the Communications Act vests this Commission with exclusive jurisdiction over interstate communications services.⁴ It is also well settled that retail Internet access, and wholesale DSL transmission used for Internet access, are both interstate communications services.⁵ Despite the clearly interstate nature of these services, the state commissions identified by BellSouth are purporting to regulate the terms and conditions under which BellSouth may provide these services.⁶

Specifically, where a UNE-based CLEC takes a BellSouth voice customer, state commissions are forcing BellSouth to: (1) provide retail DSL Internet access to that customer; and/or (2) provide wholesale DSL transport to that customer or to a third-party Internet service provider who wishes to serve that customer. Despite the highly competitive nature of the market for broadband Internet access services and the multitude of broadband offerings available to

⁴ See 47 U.S.C. §§ 151, 152; BellSouth Petition at 25-30.

⁵ See BellSouth Petition at 17-21; *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, CC Docket No. 02-33, Notice of Proposed Rulemaking, 17 FCC Rcd 3019, 3047-48 (2002) (citing *GTE Telephone Operating Cos.*, CC Docket No. 98-79, Memorandum Opinion and Order, 13 FCC Rcd 22466 (1998); *Implementation of the Local Competition Provision in the Telecommunications Act of 1996*, CC Docket No.96-98, Order on Remand and Report and Order, 16 FCC Rcd 9151 (2001).

⁶ BellSouth Petition at 5-10 (describing actions by the Florida, Kentucky, Louisiana and Georgia commissions).

consumers,⁷ these commissions assert that CLEC voice customers will be somehow disadvantaged if BellSouth is not compelled to provide them with retail DSL Internet access and/or wholesale DSL transport service. Some of these commissions attempt to justify their actions as “not attempting to regulate DSL service,” but rather “promot[ing] competition in the local voice market.”⁸

What these state commissions fail to realize is that they are, in fact, clearly regulating DSL service by dictating the class of customers that BellSouth must serve (CLEC voice customers),⁹ the conditions under which BellSouth must provide service (when a BellSouth voice customer “choose[s] to switch voice service to a [CLEC] utilizing the Unbundled Network Element Platform”),¹⁰ the manner in which BellSouth provisions service (“a seamless transition without disconnection”)¹¹ and the rates at which BellSouth must provide service (with no “additional charges . . . based on [the consumer’s] choice of local service provider”).¹²

⁷ See *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket No. 01-338, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, 18 FCC Rcd 16978 ¶¶ 259, 263 (2003) (recognizing intramodal and intermodal competition for broadband service); *High-Speed Services for Internet Access: Status as of June 30, 2003*, Wireline Competition Bureau, FCC, Table 5 (Dec. 2003) (Bell Companies serve only 31% of high-speed lines).

⁸ *BellSouth’s Provision of ADSL Service to end-users over CLEC loops- Pursuant to the Commission’s directive in Order U-22252-B*, Docket No. R-26173, Clarification Order No. R-26173-A at 8 (La. Pub. Serv. Comm’n April 4, 2003) (*Louisiana Order*). See also *Petition by Florida Digital Network, Inc. for Arbitration*, Docket No. 010098-TP, Order No. PCS-02-0765-FOF-TP at 11 (Fla. Pub. Serv. Comm’n June 5, 2002) (*Florida Order*) (“[T]his decision should not be construed as an attempt by this Commission to exercise jurisdiction over the regulation of DSL service, but as an exercise of our jurisdiction to promote competition in the local voice market.”).

⁹ *Louisiana Order* at 17-18; *Florida Order* at 11; *Petition of Cinergy Communications Company for Arbitrations of an Interconnection Agreement with BellSouth Telecommunications, Inc. Pursuant to U.S.C. Section 252*, Case No. 2001-00432, Order at 7-8 (Ky Pub. Serv. Comm’n June 5, 2002) (*Kentucky Order*).

¹⁰ *Louisiana Order* at 16. See also *Kentucky Order* at 8 (“BellSouth shall not refuse to provide its DSL service to a customer on the basis that the customer receives voice service from a CLEC that provides service by means of UNE-P”); *Florida Order* at 11 (“BellSouth shall continue to provide its FastAccess Internet Service to end users who obtain voice service from [a CLEC] over UNE loops.”).

¹¹ *Louisiana Order* at 17.

¹² *Id.*

No state commission can seriously claim that imposing this collection of requirements on BellSouth's interstate DSL-based services does not amount to state regulation of those interstate services. Indeed, the 5th Circuit Court of Appeals has found that where an agency dictates the terms under which a service must be maintained, that agency is in fact regulating the service at issue.¹³ The court held that a regulator may not cross federal-state boundaries to impose such a regulation on a service that is beyond its jurisdictional reach.¹⁴ In the instant matter, allowing state commissions to regulate retail DSL Internet access and wholesale DSL transport used for Internet access -- both of which are clearly interstate services -- would be a substantial state encroachment into federal jurisdiction and would set a dangerous precedent that threatens to undermine the Commission's authority to formulate communications policy at the national level. The Commission should promptly preempt these state attempts to regulate interstate communications services.

B. State Commissions Are Preempted From Regulating Internet Access Service.

In addition to being an interstate service, Internet access service is also an information service.¹⁵ Nearly a quarter century ago, the Commission expressly -- and wisely -- preempted

¹³ *Texas Office of Public Utility Counsel v. FCC*, 183 F.3d 393, 421-22 (5th Cir. 1999) (Commission rule prohibiting the disconnection of intrastate service was a regulation of that service because "it dictates the circumstances under which local service must be maintained.").

¹⁴ *Id.*

¹⁵ *See Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Report to Congress, 13 FCC Rcd 11501, 11536 (1998) ("We find that Internet access services are appropriately classified as information rather than telecommunications services."). The Commission also has concluded that broadband cable modem Internet access service is an information service and has tentatively concluded that wireline broadband Internet access service is an information service. *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*, GN Docket 00-185, Declaratory Ruling and Notice of Proposed Rulemaking, 17 FCC Rcd 4798, 4802 (2002); *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, CC Docket No. 02-33, Notice of Proposed Rulemaking, 17 FCC Rcd 3019, 3030 (2002). SBC recognizes that a panel of the Ninth Circuit Court of Appeals found (incorrectly, in our view) that cable modem Internet access service contains both an information service component and a telecommunications service transmission component. *Brand X Internet Services v. FCC*, 345 F.3d 1120 (9th Cir. 2003). Even if this decision is ultimately upheld on further review and subsequently applied in the context of wireline broadband Internet access service, however, the

state regulation of information services.¹⁶ As a result, the unregulated market for information services has produced incalculable social and economic benefits for the American people. Recognizing these benefits, Congress codified this hands-off policy toward the Internet in the 1996 Act when it declared that the Internet should remain “unfettered by Federal or State regulation.”¹⁷

Allowing states to now dictate the conditions under which Internet access is offered to consumers would violate Congress’s directive and would be a giant leap backward into an era of balkanized, heavy-handed regulation that is ill-suited to the competitive, dynamic, and global nature of the Internet. The Commission must affirmatively declare that it possesses exclusive jurisdiction over Internet access service and that state attempts to encroach upon that jurisdiction are categorically preempted.

III. CONCLUSION

For the forgoing reasons, the Commission should grant BellSouth’s petition for declaratory ruling.

Respectfully Submitted,

By: /s/ Jack Zinman

JACK ZINMAN
GARY L. PHILLIPS
PAUL K. MANCINI

Attorneys for
SBC COMMUNICATIONS, INC.
1401 Eye Street, NW- Suite 400
Washington, D.C. 20005
(202) 326-8911 – Phone
(202) 408-8745 – Facsimile

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telecommunications service transmission component at issue is still an *interstate* service, which is not subject to state jurisdiction for the reasons discussed above.

¹⁶ See BellSouth Petition at 19 (citing *Amendment of Section 64.702 of the Commission’s Rules and Regulations (Second Computer Inquiry)*, 88 FCC 2d 512, 541 (1981)). See also Jason Oxman, *The FCC and the Unregulation of the Internet*, Working Paper No. 31, Office of Plans and Policy, FCC (July 1999).

¹⁷ 47 U.S.C. § 230(b)(2).